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In the Supreme Court of the United States.

October Term, 1903.

No. 119.

ALVIN L. LEIGH,
Plaintiff in Error,

v.

HENRY S. GREEN,

Brief for the Plaintiff in Error.

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Attorneys for the Plaintiff in Error and of Counsel.

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This was a suit in equity brought in the District Court of Knox County, Nebraska, by the plaintiff in error, to establish his title in the lands in question, and have the title of the defendant set aside and held for naught, and to enjoin him from claiming the lands and interfering with the plaintiff's possession thereof. The plaintiff recovered judgment in the District Court. On appeal, the Supreme Court reversed the judgment, and the plaintiff brings this writ of error.

The plaintiff in error claims title under the following proceedings:

On the 4th of December, 1880, Erwin Davis was the owner in fee of the north-east and the north-west quarters of section twenty-seven and the south-west quarter and the north-west quarter and the south half of the south-east

quarter of section twenty-two all in township thirty-one, north of Range Three, west of the Sixth Principal Meridian in Knox County, Nebraska. On that day, one Algernon S. Patrick commenced his action in the District Court of that County against Davis to recover several large sums of money, and sued out of said court an order of attachment which was duly levied on said lands. The action was removed to the Circuit Court of the United States for the District of Nebraska, where judgment was rendered for Patrick with an order that the lands be sold by the marshal to pay the judgment. Under that process, the marshal sold the lands to Lionel C. Burr; and the court confirmed the sale and ordered the officer to convey the lands to the purchaser. On the 19th of May, 1894, the marshal made his deed accordingly; and on the same day Burr conveyed to James C. Crawford and Richard C. Peters, who, with their respective wives, conveyed to the plaintiff.

In 1886 the county levied taxes on the lands, which became delinquent. The lands were sold for the taxes to the Farmers' Loan & Trust Company, an Iowa corporation which received five certificates, one for each tract.

On the 30th of September, 1891, the Trust Company commenced five several actions in the District Court of Knox county, each for the foreclosure of one of said certificates. The defendants impleaded in each of these actions were Henry A. Root and the tract covered by one of the certificates. No appearance was made by any one in these actions. Decrees of foreclosure and sale were entered, upon which each parcel was sold to the defendent in error, to whom on the 16th of May, the sheriff conveyed the lands. During all the time above mentioned, Patrick lived in Omaha, Nebraska.

The statute of the state, giving to the holder of a tax

certificate the right to foreclose his lien and sell the land is as follows: (Compiled St. (1897) p. 948, Chap. 77, Art. 5.)

"Section 1. That any person, persons or corporation having by virtue of any provisions of the tax or revenue laws of this state a lien upon any real property for taxes assessed thereon, may enforce such lien by an action in the nature of a foreclosure of a mortgage for the sale of so much real estate as may be necessary for that purpose, and costs of suit.

"Sec. 2. That any person, persons or corporation holding or possessing any certificate of purchase of any real estate, at public or private tax sale, or any tax deed, shall be deemed entitled to foreclose such lien under the provisions of this act, within any time not exceeding five years from the date of tax sale (not deed) upon which such lien is based; and provided, That the taking out of a tax deed shall in no wise interfere with the rights granted in this chapter.

"Sec. 3. All petitions for foreclosure or satisfaction of any such tax lien shall be filed in the district court in chancery, where the lands are situated.

"Sec. 4. Service of process in causes instituted under this chapter shall be the same as provided by law in similar causes in the district courts, and where the owner of the land is not known, the action may be brought against the land itself, but in such case the service must be as in the case of a non-resident; if the action is commenced against a person who disclaims the land, the land itself may be substituted by order of court for the defendant, and the action continued for publication.

"Sec. 5. All sales of lands under this chapter, by decree of court, shall be made by a sheriff or other person

authorized by the court, in the county where the premises or some part of them are situated.

"Sec. 6. Deeds shall thereupon be executed by such sheriff, which shall vest in the purchaser, the same title that was vested in the defendant to the suit, at the time of the assessment of the tax or taxes against the same; and such deed shall be an entire bar against the defendant to such suit, and against all parties or heirs claiming under such defendants; and in case the land itself is made defendant in the suit, the deed shall be an absolute bar against all persons, unless the court proceedings are void for want of jurisdiction; the object and intent of this action being to create a new and independent title, by virtue of the sale, entirely unconnected with all proper titles.

"Sec. 7. The proceeds of every sale made under a decree, by virtue of this chapter, shall be applied to the discharge of the debt, adjudged by the court to be due, and of the costs awarded, and if there be any surplus it shall be brought into court for the use of the defendant, or of the person entitled thereto, subject to the order of the court.

"Sec. 8. If such surplus, or any part thereof, shall remain in court, for the period of three months, without being applied for, the court may direct the same to be put out at interest, under the direction of the court, for the benefit of the defendant, his representatives, or assigns, to be paid to them by the order of the court; the party to whom said surplus shall be loaned to be designated by the court, and the sureties, upon which said money is loaned, to be applied by the judge.

"Sec. 9. All lands sold by the sheriff by virtue of this act, shall be appraised, advertised, and sold as upon execution, and the title conferred by his deed shall be entitled to all the presumptions of any judicial sale.

"Sec. 10. This act shall be construed as cumulative and not exclusive, in respect to the remedy for enforcing liens, and collecting delinquent taxes, by sale of property or otherwise, in the cases herein provided for, and shall in no wise interefere with, alter, or amend the existing revenue laws of the state."

In his petition the plaintiff offered to pay whatever sum shall be found due for taxes, so that the action is to redeem the lands, although the prayer is to set aside the proceedings on the foreclosure.

The proceedings provided in this Act are in their nature distinctively judicial and not in any sense administrative. They are to be prosecuted in a court of general jurisdiction. But, besides the act gives to the holder of a certificate of purchase at tax sale, an action in the nature of a mortgage foreclosure, so that we have, first, a judicial court in which proceedings are to be had; and secondly, those proceedings for the foreclosure of a lien.

And the Act has been construed by the Supreme Court of the state in one important particular. Section 4 provides that when the owner is not known, the action may be brought against the land. The State Court construing this clause held (pp. 179, 180 and 193,) that the word "owner" means the owner of the fee, and does not include within its circumscription, a person holding a lien—the consequence being, that the Act does not provide that such lienholder, although known to the plaintiff and within the jurisdiction of the Court, shall be made a party or be notified of the action.

And section six provides that the deed to be made by the sheriff under the decree of foreclosure shall be an absolute bar against all persons.

The result is, that a lienholder will be concluded by a judgment in a judical action, to which he cannot be a party and of which he has no notice.

The plaintiff assigns error as follows:

First. The said Supreme Court erred in holding and deciding against the contentions of the said Alvin L. Leigh, that certain pretended act or statute of the said State of Nebraska, being sections four and six of Article 5 of chapter 77 of the Compiled Statutes, was not in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States. The said sections are in the following words:

Sec. 4. Service of process in causes instituted under this chapter shall be the same as provided by law in similar causes in the District Courts, and where the owner of the land is not known, the action may be brought against the land itself, but in such case the service must be as in the case of a non-resident; if the action is commenced against a person who disclaims the land, the land itself may be substituted by order of court for the defendant, and the action continued for publication.

Sec. 6. Deeds shall thereupon be executed by such sheriff, which shall vest in the purchaser, the same title that was vested in the defendant to the suit, at the time of the assessment of the tax or taxes against the same; and such deed shall be an entire bar against the defendant to such suit, and against all parties or heirs claiming under such defendants; and in case the land itself is made defendant in the suit, the deed shall be an absolute bar against all persons, unless the court proceedings are void for want of jurisdiction; the object and intent of this section being to create a new and independent title, by virtue of the sale, entirely unconnected with all prior titles.

Second. The said Supreme Court of the State of Nebraska erred in holding and deciding that the said pretended statute of said State was valid.

Third. The said court erred in holding that the proceedings whereby the said Alvin L. Leigh was foreclosed, were effectual to bind and foreclose his interests in the premises in the pleadings described.

Fourth. The said court erred in holding that the said proceedings for the pretended forclosure of the interests which have come to the said Alvin L. Leigh were valid and effectual for that purpose.

I.

We admit the rule in all its length and breadth, that the legislature may adopt the most summary, stringent and arbitrary administrative measures to compel the payment of taxes. For our present purpose, it may be admitted that the legislature may authorize the forfeiture of lands upon which taxes have been assessed and levied but have not been paid when due, without notice to the owner of the assessments or the levy, or of his delinquency, or of the forfeiture. The maxims and principles which protect the property of the citizen against proceedings which operate to divest him of his property without due process of law, are inappropriate to those which are intended to compel the payment of taxes. But when the State goes into its courts and invokes their power, in order to aid and give effect to such administrative proceedings, another principle obtains. In doing so it abdicates its sovereignty and puts itself on the footing of any one of its subjects. The same principles and rules which govern private citizens when seeking redress of their grievances, in the judicial courts, governs the State when it becomes a suitor or consents to be sued.

In the *United States v. Aredondo*, 6 Peters 691, it is stated (p. 734) that a controversy arose between the Captain General of Cuba and the intendant of the Island as to the superintendency of the royal domain of the Floridas. These lands had been in the possession of the Allachua Indians, but they had been abandoned before any grant was made by the intendant. A report was made by the attorney and surveyor General, on reference to them, finding the fact of abandonment on which it was decreed that the land had reverted to and become annexed to the royal domain, and the power to convey the same was vested in the intendant.

In *Mitchell v. the United States*, 9 Peters 711, 742, the Court speaking by Mr. Justice Baldwin of Aredondo's case, said:

"Considering this to be a judicial act in the nature of an inquest of office, and the decree of the intendant as making the fact a *res adjudicata*, we did not feel at liberty to look behind it for the evidence on which it was founded; the consequence of which was, that by the judgment of a competent tribunal, the land was part of the royal domain, subject to the disposition of the intendant. There is no pretense of a similar proceeding having been had in relation to these lands; nor could there well be in opposition to the evidence in the record, especially the report of the assessor-general, in 1817, that they were the lands of the Seminoles at the time of the cession by them, and the confirmation by Governor Folch. By the common law the king has no right of entry on lands which is not common to his subjects; the king is put to his inquest of office, or information of intrustion, in all cases where a subject is put to his action; their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to lands, he cannot acquire it without office found, so as to annex it to his domain."

In *Brent v. Bank of Washington*, 10 Pet. 596, the facts were these: Robert Brent, a paymaster in the Army died, leaving a will, and owning 659 shares of the stock of the bank of Washington, to which he was indebted on three notes. The charter of the Bank provided that "all debts actually due and payable to the Bank by a stockholder requesting a transfer, must be satisfied before such transfer shall be made, unless the president and directors shall direct to the contrary," and that "the shares of capital stock

at any time owned by any individual stockholder shall be transferable only on the books of the Bank according to such rules as may, conformably to law, be established in that behalf by the president and directors." Brent was also indebted to the United States upon his accounts as paymaster. The executors called on the Bank to allow them to transfer the stock. This was refused upon the claim that the Bank had a lien for the amount of the notes. Thereupon, the executors filed their bill for a decree to transfer the stock discharged from any lien of the Bank, on the ground that Brent being a debtor to the United States, and his estate being insufficient to pay his debts, the United States ought to be first paid, under the Act of Congress providing that where any officer of the United States, being indebted to them, shall become insolvent, or the estate of any deceased debtor shall be insufficient to pay all of his debts, that due the United States shall be first satisfied.

The Court treated the case as a bill filed by the United States in the name of the executors; and the question was whether they were entitled to the transfer of the stock free from the debt to the Bank.

Mr. Justice Baldwin delivering the opinion of the court, said:

"The United States have no pretense of a legal right to a transfer of the stock to themselves, or to recover damages for refusing it: the right to hold the stock devolves on the executors, to whose hands it must come for sale and distribution: the proceeds, not the stock, go to the United States in virtue of their priority: such are the words of the law—'the estate of any deceased debtor in the hands of executors or administrators'. Thus compelled to come into equity for a remedy to enforce a legal right, the

United States must come as other suitors, seeking, in the administration of the law of equity, relief; to give which, courts of law are wholly incompetent, on account of the legal bar interposed by the bank. This court, in the *United States v. Mitchell*, 9 Peters 743, have recognized the principle in the common law, that though the law gives the king a better or more convenient remedy, he has no better right in court than the subject, through whom the property claimed comes to his hands. 2 Co. Inst. 573; 2 Ves. Sen. 296, 297; Hard. 60, 460. This principle is also carried into all the statutes, by which the appropriate courts are authorized to decide, and under which they do decide on the rights of a subject in controversy with the king, according to equity and good conscience between subject and subject. 7 Co. 19; 6 Hard. 27, 170, 230, 502; 4 Co. Inst. 190."

Smoot's case, 15 Wall. 36, was an action in the Court of Claims to recover damages for breach of contract for the sale of horses to the government. When the contract was made, the usual course of business was for the contractor to buy his horses subject to inspection, and present them for inspection when they were immediately examined in the presence of the owners; if satisfactory, they were accepted; if not, they were rejected and returned to the owner. Afterwards the bureau of cavalry issued an order which required that each horse be placed in the inspection yard twenty-four hours before inspection; when all persons but the inspector and his assistants should leave the yard until after the inspection and branding. All rejected horses were to be branded; horses rejected and presented to the government without notice of that fact should be deemed a fraud, and be branded on the left shoulder as a fraud. Other effects followed the order, prejudicial to the

contractor. Smoot complained of the order to the Chief of Cavalry, but without effect, and was unwilling to deliver any horses under the new order. The Court of Claims found that his fair profits would have been $10.00 a horse, and gave him on his contract, $20,000. The United States appealed. It was urged in behalf of the vendor that a much more liberal rule ought to be applied in such cases, in favor of parties, on account of the power and resources of this great government.

Mr. Justice Miller, speaking for the Court, said on this point:—

"In approaching the inquiry into the effect which the action of the bureau of cavalry, in adopting these new rules for inspection, had upon the rights of the parties to this contract, let us endeavor to free ourselves from the consideration that the government was one party to the contract, and that it was for a large number of horses; for we hold it to be clear that the principles which must govern the inquiry are the same as if the contract were between individuals, and the number of horses one or a dozen instead of four thousand."

In the *State v. Kennedy*, 60 Nebr. 300, the facts were these: Acting under a statute, the Governor appointed Peabody and three others the Fire and Police Commissioners for the city of Omaha. An information in the nature of a writ of *quo warranto* was filed questioning the validity of the act under which the Governor appointed them. Pending this proceeding, the Mayor and Council of the city of Omaha provided by ordinance for such a board, and appointed Collins and three others, commissioners. These men intervened in the action and set up their claims insisting that the ordinance was valid and the statute invalid. Judgment was rendered against the Governor's appointees and ousted

them from office and the appointees of the Mayor and Council were installed in their places. The present case was an information in the nature of a *quo waranto* calling on the appointees of the Mayor and Council to show the authority under which they were acting.

Mr. Justice Sullivan speaking for the Court, said:

"One of the defenses interposed by the respondent is that the judgment in the Moores Case, whether right or wrong, is binding and conclusive upon the parties to this litigation. Counsel for the interveners, on the other hand, contend that while the doctrine of the *res adjudicata* applies to ordinary suitors, it has no application to a sovereign state. The question thus raised is an important one, and we have given it careful consideration, reaching the conclusion after much reflection and thorough investigation of the authorities that when a state invokes the judgment of a court for any purpose, it lays its sovereignty aside and consents to be bound by the decision, whether such decision be favorable or adverse. While the state as a political community is not obliged to submit to the jurisdiction of its own courts, it ought, in reason and justice, to be bound whenever it voluntarily appears in court and without reservation submits a matter in controversy for adjudication. The courts possess a portion of the sovereign power; they have authority to decide between litigants; and authority to decide implies, always, power to make their judgments effective. It is said by Mr. Justice White in *New Orleans v. Citizens Bank*, 167 U. S. 371, 399, that the very essence of judicial power is that when a matter is once ascertained and determined, it is forever concluded when it arises again under the same circumstances and conditions between parties or their privies. It is claimed by counsel for the interveners that there is

a distinction between the effect of a judgment for or against a state, when appearing as a suitor in its corporate capacity, and the effect of a judgment upon a matter pertaining to its sovereignty. The authorities, excepting perhaps *State v. Cincinnati Gas Light & Coke Co.*, 18 Ohio St., 262, give no countenance to the claim. In 7 Comyn's Digest, title '*quo warranto*,' 201, it is said: 'The judgment in *quo warranto* is final; for it is in the nature of a writ of right. And, therefore, if judgment be against the king, the king shall be forever bound as to the thing adjudged.' In 3 Blackstone's Commentaries, p. 263, the author says: 'The judgment on a writ of *quo warranto* (being in the nature of a writ of right) is final and conclusive, even against the crown.' 'And such substantially,' said Lewis P. in *Shumate v. Fauquier County*, 84 Va., 574, 'is the effect of a judgment in the more modern proceeding by information in the nature of a *quo warranto*.' In *McClesky v. State*, 4 Tex. Civ. App. 322, 23 S. W. Rep. 518, which was a proceeding by information in the nature of a *quo warranto* to dissolve the incorporation of a town, it was held that a former judgment in favor of the respondents in a similar proceeding, was, under the doctrine of *res adjudicata*, binding and conclusive on the state. *People v. Holladay*, 93 Cal., 241, 27 Am. St. Rep. 186, was an action by the state, on the relation of the attorney general, to abate an alleged nuisance, caused by the erection of fences and construction of buildings upon Lafayette Park in the city of San Francisco.

"It had been previously determined in an action between Holladay and the city and county of San Francisco, that the property in question was not public ground, and the determination was held to be conclusive upon the state, it having been represented in the first cause by the municipality, which was a public agent acting within the scope

of its authority. In delivering the judgment of the court, DeHaven J. said, p. 248: 'The city and county of San Francisco is a municipal corporation created by the legislature of the state, and has conferred upon it by the state full power and jurisdiction over the public squares within its territorial limits, with the right to sue and be sued; and this necessarily includes the authority to maintain and defend all actions, relating to its right to subject to the public use such squares or land claimed by it to have been dedicated for such purposes; and in any action brought by it for the purpose of vindicating and protecting the public rights in such squares, or land claimed as such, the state would be bound by the result, because in such action the city and county would in fact represent the people of the state by virtue of the authority given it to maintain such actions for the purpose of preserving the public rights of which it is the trustee.' And further along in the opinion this language is used: 'The rule that the citizens shall not be twice vexed for the same cause of action is as binding upon the state as upon other litigants; and the legislature, in conferring upon the city power to maintain and defend in the courts the rights of the state to streets and squares within its limits, must be presumed to have done so with reference to this well known maxim, and to have intended that the state should be bound by the result of such litigation.' This decision is a direct authority against the contention of counsel for the interveners, for it is a case in which the state went into court to enforce its laws and vindicate the rights of the public to use and enjoy what was claimed to be a public park. To the same effect is *People v. Smith*, 93 Cal., 490, which was an action to abate a nuisance upon land alleged to be a public street. The controversy, of course, pertained to the sovereignty of the state; but the state was, nevertheless, held to be affected

by the doctrine of *res adjudicata*. The principles which controlled the California decisions are precisely the same as those which governed the decision in the case of *Holsworth v. O'Chander*, 49 Nebr. 42. The last named case is really decisive of the question which we are now considering. The essence of the decision is that a judgment against a public officer in regard to a public right is, under certain circumstances, binding upon the public; and that such officer is in privity with his predecessor. We reproduce here a portion of the opinion: 'We cannot upon this record doubt that the judgment here pleaded would have been a complete bar to a subsequent proceeding by Barnes, the plaintiff's prodecessor, in his official capacity to restrain the further interference by defendant's grantor with the alleged highway. The acts charged as the basis of the former action, and the interposition therein by the overseer named of his official character in justification, was but the assertion in behalf of the public, of a public right, by its accredited representative, acting within the scope of his authority. It was, in legal effect, an act of the public, not as a body corporate it is true, but according to its more comprehensive definition, which includes the people or community at large, without regard to the territorial limits of any town or county. The public is, in that enlarged sense of the term, a distinct legal entity, capable of acquiring rights by adverse use, and it may in turn lose such rights by nonuser. It was in that sense privy to the claim asserted in its behalf, and is accordingly concluded by the adverse result. The overseer of highways, against whom the first judgment was rendered, represented the state; he was acting in his official capacity and within the scope of his authority; and the judgment was binding upon his successor who, in relation to the matter in dispute, was exercising a portion of the sovereign power. The second over-

seer derived his powers from the state; he did not derive them from his predecessor; and he was bound and his authority limited only because the state was bound and its authority limited by the first judgment in favor of O'Chander. Quite like the case of *Holsworth v. O'Chander* is the recent case of *O'Connell v. Chicago T. T. R. Co.*, 184 Ill. 308, 56 N. E. Rep. 355, in which it was held that a judgment against a public corporation binds the public. In the case of *State v. Moore, supra*, it was decided that the state, acting through its governor, could not appoint fire and police commissioners for Omaha. That judgment is conclusive upon the state and, as a matter of course, is binding upon the governor and those claiming through or under him."

The Siren, 7 Wall. 152, was a libel against the Siren which had been captured in the harbor of Charleston in attempting to violate the blockade of that port, and put in charge of a prize master and crew and ordered to Boston for adjudication. While proceeding to that port, she ran into and sank the Sloop Harper.

Mr. Justice Field delivered the opinion of the court, in which he said:

"It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered and the public safety endangered, if the supreme authority could be subjected to suit, at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This

doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in *United States v. Clarke.*

"The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly, and suits against its property.

"But although direct suits cannot be maintained against the United States or against their property, yet, when the United States institute a suit, they waive their exemption, so far as to allow a presentation by the defendant of setoffs, legal and equitable, to the extent of the demand made or property claimed; and when they proceed *in rem,* they open to consideration all claims and equities in regard to the property libelled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy. In *United States v. Ringgold* a claim of the defendant was allowed as a setoff to the demand of the government. 'No direct suit', said the court, 'can be maintained against the United States. But when an action is brought by the United States to recover moneys in the hands of a party who has a legal claim against them, it would be a very rigid principle to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to Congress.' So in the *United*

States v. MacDaniel, to which reference is made in the case cited, the defendant was allowed to set off against the demand of the government a claim for services as agent for the payment of the navy pension fund, to which the court heid he was equitably entitled. The question, said the court, was, whether the defendant should surrender the money which happened to be in his hands, and then petition Congress on the subject; and it was held that the government had no right, legal or equitable, to the money."

In many cases this rule has been applied.

Clark v. Barnard, 108 U. S. 436, 437.

Burrs v. Arkansas, 20 How. 271, 529.

Moore v. Tate, 87 Tenn. 725.

Greene v. State, 73 Cal. 29.

People v. Stephens, 71 N. Y. 527.

Southern Pacific Railroad Co. v. the United States, 183 U. S., 519.

If the State, by going into its courts for the purpose of invoking their powers in its behalf, puts itself on a footing with its citizens, a private party holding under the sovereign can be in no better condition. And such private party cannot claim any exemption which the State does not enjoy. But it is quite useless to press such a contention.

II.

Questions relating to taxation and to proceedings to compel the payment of taxes, when brought within the judicial cognizance, are not exceptions to what has been said. All of the judgments, in which the rule has been laid down that the State may adopt whatever measures it sees fit to enforce taxes, were where the proceedings in question were administrative; in none of them was the rule applied to judicial process.

Nor are we able to perceive any difference between a judicial act in the nature of an inquest of office and a judgment of a court to whose jurisdiction the state submits, involving the validity of taxes. In one as well as the other, the right of the state as against the citizen is the same as that in question between two citizens. The necessities of the State in the latter case are not involved in the judicial process as they are in administrative proceedings. Those necessities are satisfied by sale of the property taxed, or, if you please, by forfeiture without a sale. By the sale, the state realizes the amount due for the taxes, and by a forfeiture it acquires the estate which is all that can be obtained in any way. The reason of the rule does not therefore obtain when an action is brought by the state and carried into judgment.

Davidson v. New Orleans, 96 U. S. 97, was a petition of the city of New Orleans and the administrators thereof, setting forth an assessment on certain real estate, made under the statutes of Louisiana, for draining swamp lands within the parishes of Carroll and Orleans; and asking that the assessment be homologated by the judgment of the court. The estate of John Davidson was assessed for various parcels in different places for about $50,000. His

widow and testamentary executrix appeared in that court and filed exceptions to the assessment; and the court refused the order of homologation, and set aside the entire assessment, with leave to the plaintiffs to present a new tableau.

On appeal from this decree, the Supreme Court of Louisiana reversed it, and ordered the dismissal of the oppositions, and decreed that the assessment-roll presented be approved and homologated, and that the approval and homologation so ordered should operate as a judgment against the property described in the assessment-roll, and also against the owner or owners thereof. Mrs. Davidson then sued out the writ of error to review this judgment.

Mr. Justice Miller delivered the opinion of the Court, in which he examined with much learning and great discrimination, the phrase "due process of law." After pointing out the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, he says that the result must be reached by the gradual process of judicial inclusion and exclusion, as the cases presented for decision may require, with the reasoning on which such decisions may be founded, and says:

"As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us:—

"That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the

ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

"It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the Fourteenth Amendment was adopted, the provision on that subject, in immediate juxtaposition in the Fifth Amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in *Loan Association v. Topeka* (20 Wall. 655). But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

This proposition is the converse of our contention; but it clearly implies that laws imposing taxes upon property which provide a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, without notice to the owner, the judgment deprives the owner of his property without due process of law. The whole course of reasoning of the learned judge justifies the inference that such would, in his opinion, be the rule.

In *Hagar v. Reclamation District* 111 U. S. 701, the Act under consideration was passed by the Legislature of California establishing a system for draining swamp and overflowed marsh, salt and tide water lands, and thus fitting them for cultivation. The Act provided for a Board which was to formulate and report to the Supervisors of the County, plans and estimates for the works. The supervisors were to appoint three commissioners to assess upon each acre of the lands to be reclaimed or benefited, a tax proportionate to the whole expense and to the benefits to result from the works. The commissioners were to make a list of the amounts due from each owner of land in the district and the amount due from each unsold tract, and file the same with the county treasurer. If the tax were not paid in thirty days thereafter, the District Attorney was to proceed against delinquents in the manner provided for the collection of state and county taxes. Thereupon, the District No. 108 brought an action against Hagar for a decree declaring that the sums assessed against his lands were liens thereon and for their sale to satisfy the charges. The case was removed to the Circuit Court of the United States, which held that the sums assessed were valid liens upon the lands, and ordered them sold for their payment and the defendant appealed. The appellant contended that he was afforded no opportunity to be heard respecting the assessment, and insisted that this was essential to render any proceeding due process of law.

Mr. Justice Field, delivered the opinion of the court, in the course of which he showed that taxes were of two classes; one of which was according to due process of law, although no notice was given to the owner or the party affected thereby; the other was where the tax was levied upon property according to its value to be ascertained by officers appointed for the purpose who act judicially.

After stating various provisions to be found in the statutes of the states for notices to the owners of property, he says:

"The assessment under consideration could, by the law of California, be enforced only by legal proceeings; and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation assessments, if not altered by a Board of Revision or of Equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits; and, of course, to their validity it is essential that notice be given to the tax-payer and opportunity be afforded him to be heard respecting the assessment."

New Orleans v. The Citizens' Bank, 167 U. S. 371, was an action brought by the Bank against taxing officers of the State representing it, to restrain them from assessing the property and capital of the Bank for the purposes of taxation. The charter of the Bank provided that its capital should be exempt from any tax by the State or by any parish or body politic under the authority of the State during the continuance of its charter.

Five successive attempts were made to assess the Bank and petitions to enjoin them were filed and judgments were rendered in favor of the Bank enjoining the proceedings of the taxing officers. Two of them were in cases respecting the taxes of 1886 and 1887.

The Bank filed its bill in the Circuit Court of the United States against the city of New Orleans, the Board of State Assessors for the parish of Orleans, and the City Collectors for various collection districts in the Parish of Orleans, alleging that although the Bank was contractually exempt from state and municipal tax under its

charter and the acts supplemental thereto, the Board of Assessors were about to assess the Bank for the taxes of 1889, 1890, 1891 and 1892; and that the fact of the exemption claimed by the Bank, was conclusively determined by the judgments previously rendered between the parties. The prayer was for a restraining order and an injunction enjoining the Board of Assessors from taking the steps necessary to make the assessment, from completing the assessment and from collecting any tax thereunder, but allowing the assessors to obtain the necessary information from the Bank to make the assessment, and also the formal making of the assessment by the State Board to the final decision as to its legal right to assess the Bank, but restraining any attempt to collect any tax or to enforce any assessment after it was made under the conditions above stated until the final decision in the cause. Answers were filed denying the right of the Bank to the exemptions claimed. A decree was entered against the defendants enjoining the collection of taxes for designated years by the State of Louisiana and the city of New Orleans upon the capital, property and shares of stock of the shareholders of the Bank whether assessed against the Bank or its shareholders, and from demanding or collecting from the Bank, any state or city license tax. From this decree, the defendants appealed.

In all of the five suits, the same claims were made by the Bank against the state officers, by whom the same defenses were alleged.

Mr. Justice White delivered the opinion of the Court stating on page 387 that the question for decision was, "are not the judgments rendered between the Bank, the Board of Assessors, the city of New Orleans and the taxing

officers, absolutely conclusive under the principle of the thing adjudged, of the issue here presented?"

The learned judge confined the inquiry to the two judgments rendered by the District Court, one as to the taxes of 1886 and the other as to those of 1887.

He also found that there was an identity of the issue between the case under consideration and the judgment for the tax of 1886, and that of 1887 and says on page 395:

"It results from the foregoing, that the two judgments rendered after the expiration of the original charter necessarily adjudged the claim of exemption upon identically the same facts and conditions as those here presented, and they therefore are conclusive, unless the proposition be sound that a claim for taxes for one year, being a distinct cause of action from the tax for a subsequent year, the judgment holding that the tax of a prior year cannot be assessed or collected, can never be the subject of the thing adjudged as to the tax for the future year, however absolute may be the identity of the defence and of the facts upon which the defence is founded."

Upon very careful consideration, the learned judge found that a judgment holding that the tax of a prior year cannot be assessed, concludes the question as to the tax of a future year where there is an identity of the defence and the facts upon which the defence is founded, saying on page 398: "It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented, and determined upon identically the same facts upon which the right of exemption is now claimed."

The learned judge then proceeds to consider whether

the rule of estoppel or, "the thing adjudged," applies to controversies as to taxation, and on that subject, says:

"The argument that as a matter of public policy the principle of the thing adjudged should be held not to apply to controversies as to taxation, if there be merit in it, should be addressed to the law-making and not to the judicial department. But if the judicial mind could entertain the suggestion, it seems clear that it is without real merit. In its ultimate aspect it asserts that no question concerning government or public authority ought ever to be submitted to judicial investigation. Indeed, the contention is that there is no power in courts of justice to consider any question of taxation or render any judgment in relation thereto. That this is the result of the proposition is manifest from the fact that the very essence of judicial power is, that when a matter is once ascertained and determined, it is forever concluded when it arises again under the same circumstances and conditions between parties or their privies. To admit the judicial power on the one hand, and to deny on the other the very substance and essence of such power, is not only contradictory, but destructive of the fundamental conceptions upon which our system of government is based. Under this theory, the cause under consideration should not be entertained, but should be dismissed. Accepting the argument in its full consequence, every judgment rendered by this court from the foundation of the government, declaring a particular tax or burden unconstitutional, imports no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to the tax was a part of the obligation, is deprived of the sanctity of the thing adjudged, for, manifestly, if the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel cannot also result from a judgment enforcing taxation."

III.

What has been said eliminates from the inquiry the circumstances, first, that the defendant derives his rights from the State, which, if it were the party suing, would be subject to the rules governing actions between private parties, and, secondly, that the action, judgment, sale and deed in the foreclosure proceedings were to enforce the payment of taxes.

It remains to examine the statute and the proceedings to foreclose the tax liens in order to determine their validity. The statute changes the form of such proceedings from actions *in personam*, to actions *in rem*, and, by applying the rule in the latter that all the world is a party to them, attempt to avoid the necessity of bringing in lienholders personally. It does not contemplate a lienholder as a party or as having any connection with the suit, or as capable of intervening in it; nor any showing that Patrick who held an attachment lien on the land, when the foreclosure suits were brought, was a resident of the State, or known, or could be served with process. On the other hand, he lived at the time in Omaha, and his lien and what was its nature could easily have been learned by resorting to the Court for the county in which the lands were situate.

It is pertinent to inquire what is the nature of a proceeding *in rem*. This is answered by the judgment in *Freeman v. Alderson*, 119 U. S. 185.

On the 16th of July 1855, a tract of land was patented by Texas to Alderson. D. C. and G. R. Freeman claimed an undivided half of the tract and brought an action for partition against Alderson. He was a non-resident of the State, no personal service was made upon him, nor did he appear in the action. The citation to him was made by

publication. Judgment was rendered against him adjudging that the plaintiff recover his costs. The Commissioners reported to the Court that they had divided the lands into two equal parts. The Court confirmed the report and adjudged that the title to one of them was divested from Alderson and vested in the Freemans, and that they recover their costs and that execution issue therefor. Execution for the costs was levied upon the half of the tract adjudged to Alderson in the partition suit, which was sold to the grantor of D. C. Freeman, to whom the sheriff made a deed. Freeman then brought this action to recover the possession of Alderson's half of the tract. On the trial, he offered in evidence the judgment for costs, the execution issued thereon and the sheriff's deed; to the introduction of which the defendants objected on the ground that the judgment for costs was a judgment *in personam* and not *in rem*, and was rendered against the defendant who was a non-resident of the State, without his appearance in the action or personal service upon him, but upon a citation by publication only, and constituted no basis of title in the premises under the execution. The Court sustained the objection and excluded the documents from the jury. No other evidence of title being presented by the defendants, a verdict was found for the plaintiffs and judgment in their favor was entered thereon.

Mr. Justice Field delivered the opinion of the Court, saying:

"Actions *in rem*, strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libellants or plaintiffs. The property itself is in such actions the defendant, and, except in cases arising during war for its hostile character, its forfeiture or sale is sought for the wrong, in the commis-

sion of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The Court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case.

"There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required and that judgment therein is only conclusive between the parties."

And the learned Judge says:

"Such action,(i. e. an action for partition of lands,) though dealing entirely with the realty, is not an action *in rem* in the strict sense of the term; it is an action against the parties named, and, though the recovery and partition of real estate are sought, that does not change its character as a personal action; the judgment therein binds only the parties in their relation to the property. The service of citation by publication may suffice for the exercise of the jurisdiction of the court over the property,

so far as to try the right to its possession, and to decree its partition; but it could not authorize the creation of any personal demand against the defendant, even for costs, which could be satisfied out of his other property."

Thus it appears that "actions for the enforcement of mortgages and other liens" are not actions *in rem* strictly considered. They differ from actions strictly *in rem*, among other things, in that the interest of the defendant is alone sought to be affected; that citation to him is required and that judgment therein is only conclusive between the parties.

Our concern with the statute is not because it attempts to transfer actions to foreclose a tax lien from the class called *in personam* to that called *in rem*. The legislature undoubtedly may have the power to regulate the form of remedies. Although it shocks our sense of propriety and runs counter to our habits, it may perhaps go so far as to substitute the property for the parties interested in it. Thus it may be competent for the legislature to provide that in an action to foreclose a mortgage, the mortgaged premises may be named as defendant without impleading the owner or other parties interested. But what is radically wrong in this statute is that it attempts by the judgment and proceedings which it authorizes, to conclude parties who have no notice of them, although resident within the jurisdiction and accessible to process and known to the plaintiff, and knowledge of the interests is easily ascertainable. If that can be done by the legislature simply by changing the form of the action, it can evade the fundamental principle in the jurisprudence of all civilized peoples that no judgment is of any validity against one not a party to the action in which the judgment is rendered. If a party can be condemned unheard

and his property be wrested from him, then the constitutional provision that no one shall be deprived of his property withou due process of law, is a fiction and a snare.

Tyler v. The Court of Registration,175 Mass. 71, was a writ of prohibition against the judges of the Court of Registration established by an Act of the Legislature, and was brought to prevent their proceeding upon an application concerning land in which the petitioner claimed an interest, on the ground that the Act was unconstitutional, because the registration deprived all persons of their property except the owner, without due process of law. The learned Chief Justice in an elaborate opinion expressed the view that the Act provided for a notice to the parties affected by the proceeding, although it was not personal and might not come home to them. Two of the judges were disinclined to that view and the three agreed to a ground of decision stated by the Chief Justice as follows:

"But perhaps the classification of the proceeding is not so important as the course of the discussion thus far might seem to imply. I have pursued that course as one which is satisfactory to my own mind, but, for the purposes of decision, a majority of the court prefer to assume that in cases in which under the constitutional requirements of due process of law, it heretofore has been necessary to give to parties interested actual notice of the pending proceeding by personal service or its equivalent, in order to render a valid judgment against them, it is not in the power of the Legislature, by changing the form of the proceeding from an action *in personam* to a suit *in rem*, to avoid the necessity of giving such a notice, and to assume that under this statute personal rights in property are so involved and may be so affected, that effectual

notice and an opportunity to be heard should be given to all claimants who are known or who by reasonable effort can be ascertained."

The other two judges dissented in an opinion delivered by Loring, J., holding that the act did not provide for service of notice upon which a judgment could be rendered.

These authorities establish the following propositions:

1. That an action to foreclose a tax lien is not strictly *in rem*, but is one only *quasi in rem* and in order to the validity of a judgment, there must be service of process or a notice equivalent thereto.

2. That when a person interested in property is known, and is a resident and within the jurisdiction, so that he can be personally reached by process, he cannot be cut off by a judgment in an action to which he is not a party and of which he has no notice.

IV.

It is no answer to say that the notice published in the newspaper ran to "all persons interested" in the land, for the statute does not authorize or contemplate such notice, or any notice to any one but the owner of the fee; and, besides, if notice by publication were authorized by statute, it must, to be effective, run to the parties to be reached by it and not to all interested parties without naming them.

The case is this: Patrick had a lien upon the land which was carried into judgment. A sale was made under which the plaintiff in error claims title.

After Patrick acquired his lien, taxes were levied on the land, and the land sold to the Farmers' Loan and Trust Company, which took not a deed, but only certificates of sale which gave it a lien. The Company brought its action to foreclose its lien, making the land the only defendant. It did not make Patrick a party. He was a resident of the state, and he could have been reached by process. The company knew or could have learned by examining the records, that Patrick had a lien and what was its nature. No notice was given to him. The statute did not contemplate impleading him in the action or giving him any notice of the action.

The statute attempts to cut off his interest.

The question is, Is that due process of law?

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